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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Pay Telephone) CC Docket No. 96-128
Reclassification and Compensation)
Provisions of the)
Telecommunications Act of 1996)

**JOINT COMMENTS OF
EXCEL TELECOMMUNICATIONS, INC. AND
TELCO COMMUNICATIONS GROUP, INC.**

Excel Telecommunications, Inc. ("Excel") and Telco Communications Group, Inc., on behalf of its operating subsidiaries ("Telco"), by undersigned counsel and pursuant to the Commission's Public Notice of August 5, 1997, hereby submit their Joint Comments in the above-referenced proceeding.

Excel and Telco object to any adherence by the Commission to a \$.35 default per-call compensation rate for subscriber 800 and access code calls. The overwhelming evidence presented on the record throughout the various procedural stages of this matter makes clear that basing the default rate for subscriber 800 and access code calls on the local coin call rate is unjustifiable. Excel and Telco also believe that the Commission must revise its flat-rate interim compensation mechanism in light of the decision issued by the United States Court of Appeals for the District of Columbia Circuit.¹ Rather than arbitrarily limiting the responsibility for compensation to the largest interexchange carriers ("IXCs"), the Commission must require that *all* carriers -- including local exchange carriers ("LECs") -- compensate payphone providers for subscriber 800 and access code

¹ *Illinois Public Telecomm. Ass'n v. FCC*, D.C. Circuit Nos. 96-1394, *et. al.* (July 1, 1997).

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calls during this interim period. In addition, Excel and Telco urge the Commission to grant the pending waivers of carriers such as Telco, who are able to track and pay interim compensation on a per-call basis. Finally, Excel and Telco contend that any effort by the Commission to include 0+ calls in the flat-rate interim compensation mechanism would be arbitrary and capricious. Many IXC's carry little, if any, 0+ traffic, and should not be compelled to compensate payphone providers for such calls. Instead, the Commission should require that 0+ calls be compensated on a per-call basis.

I. THE DEFAULT RATE FOR COMPENSATION OF SUBSCRIBER 800 AND ACCESS CODE CALLS MUST BE SET LOWER THAN THE LOCAL COIN CALL RATE.

The *Illinois Public Telecomm. Ass'n* decision demonstrates quite clearly that the Commission cannot set the rate for subscriber 800 and access code calls at the same level as the local coin call rate. While the Commission previously ruled that "the cost of originating the various types of payphone calls are similar,"² it offered no underlying evidence to support this conclusion. Instead, the D.C. Circuit found that "this case is replete with evidence that the costs of local coin calls versus 800 and access code calls are *not* similar."³ The D.C. Circuit noted that a number of cost factors relating to the carriage of coin calls simply are inapplicable in a dial-around context. For example, payphone service providers ("PSPs") are forced to purchase and administer coin equipment and engage in coin collection. *Id.* Given that the D.C. Circuit has already rejected the \$.35 compensation rate as unexplained and inexplicable, the Commission has no choice but to reduce the \$.35 rate set in the

² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541, XXXXX, at ¶ 70 (1996) ("Order").

³ *Illinois Public Telecomm. Ass'n*, No. 96-1394, slip op. at 14.

Order and reaffirmed in the *Reconsideration Order*.⁴ Even the American Public Communications Council -- a payphone industry representative -- has admitted, "Arguably the local coin rate should be *higher* than the rate for a non-paid sent call because of the usage and coin collection costs typically associated with local coin calling."⁵

On remand, the Commission's revised rate should reflect those issues noted in the D.C. Circuit's opinion, as well as several other cost factors highlighted by IXCs in comments filed throughout this proceeding. Sprint, in its Comments during the initial phase of this proceeding, noted that in addition to the cost of purchasing central office equipment for coin service and coin collection costs, the local coin rate incorporates "the cost of transporting the call from the payphone to the called party within the local calling area [and] the cost of switching that call."⁶ Similarly, AT&T provided in its Reply Comments a clear contrast between the costs and functions associated with a local coin call and a subscriber 800 or access code call. Specifically, AT&T pointed out that when a PSP carries a local call, it is responsible for "local switching, call completion to the terminating party, central office coin service functionalities (if applicable) and all aspects of coin rating and collection." With a subscriber 800 or access call, however, "the PSP merely delivers the call from the payphone to the serving LEC central office."⁷

The Commission should therefore adopt a default rate that more accurately reflects the costs

⁴ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, 11 FCC Rcd 21233 (1996) ("*Reconsideration Order*").

⁵ Comments of APCC, at p.16, n.15 (filed July 1, 1996).

⁶ Comments of Sprint Corporation, at p.9 (filed July 1, 1996).

⁷ Reply Comments of AT&T Corporation, at p.12 (filed July 15, 1996).

that an efficient PSP would actually incur in delivering a subscriber 800 or access code call in this manner. An appropriate and simple way to determine this rate would be to subtract those costs that are unique to the local coin rate (e.g., coin equipment and collection, coin rating, originating and terminating access) from the local coin rate itself. This calculation would yield the net cost for the PSP in carrying the call to the LEC central office. While the Commission may wish to solicit further information regarding the applicable costs, it should not entertain arguments from the payphone industry that the costs for these coinless calls in fact equal \$.35. It is clear from the *Illinois Public Telecomm. Ass'n* decision that this rate cannot be justified on the basis of evidence already in the record. Thus, rather than opting for a rate that is in some manner vaguely similar to the local coin rate, the Commission must set a rate based on the costs of delivering a subscriber 800 or access code call, which the D.C. Circuit has already determined, must be less than \$.35.

II. THE COMMISSION SHOULD FAIRLY APPORTION FLAT-RATE INTERIM COMPENSATION AMONG ALL CARRIERS ON THE BASIS OF TOLL REVENUES.

The *Illinois Public Telecomm. Ass'n* opinion requires the Commission to revise its interim flat-rate compensation mechanism to justify which carriers will be required to compensate PSPs during this period.⁸ As a fundamental matter, the Commission must ensure that all carriers, including LECs, pay a fair portion of payphone compensation. IXC's are not the only telecommunications carriers to offer customers dial-around capability. Many LECs also provide customers with calling cards that allow customers to avoid the use of coins in making calls from payphones. As the D.C. Circuit accurately commented, "Administrative convenience cannot possibly justify an interim plan that exempts all but large IXC's from paying for the costs of services received." *Id.* If any

⁸ *Illinois Public Telecomm. Ass'n*, No. 96-1394, at p.17.

compensation mechanism is to be considered fair, it therefore must first require appropriate compensation from all kinds of carriers.

Although the best measure for allocation remains the amount of payphone traffic actually handled by each carrier, the Commission has concluded -- and no party has disputed -- that such a tracking mechanism is not available to all IXC⁹. Until per-call tracking is in place, then, the Commission must utilize some other means of ensuring compensation for PSPs. Excel and Telco submit that the Commission should adhere to its earlier determination that total toll revenues are a suitable substitute for per-call compensation during this interim period. But as discussed above, in the interests of fairness to all carriers, the Commission should not limit this responsibility to only IXC^s. The Regional Bell Operating Companies ("RBOCs") and other LECs also generate a significant amount of revenue from their carriage of intraLATA toll traffic, and in light of the fact that these companies offer dial-around capability as much as many IXC^s, the Commission should not exclude their toll revenues from consideration in assessing responsibility for compensation.

Although the Commission presumably imposed this duty only upon the largest IXC^s because their total toll revenues are readily available as a result of the reporting requirement imposed by Section 43.21(a) of the Commission's Rules,¹⁰ Excel and Telco note that the Telecommunications Relay Service Fund Worksheet (Form 431) required by the Commission of all carriers makes the revenues of all carriers readily accessible for use in this instance. To calculate each carrier's responsibility, the Commission would only need to add these revenues together and then calculate each carrier's responsibility as a percentage of the total. The Commission's concern about

⁹ See *Order*, at ¶ 51.

¹⁰ 47 C.F.R. § 43.21(a) (1996).

administrative convenience could be addressed by exempting carriers whose payments or percentages approached some *de minimis* threshold. Such a mechanism will better apportion responsibility for interim compensation of PSPs, without placing an unfair or undue burden on any one carrier or segment of the industry.

It is important, moreover, that the Commission allow those carriers who have the ability to track calls on a per-call basis to do so immediately. The D.C. Circuit ruled that the flat-rate interim compensation mechanism was arbitrary and capricious in part because, "it did not establish a nexus between total toll revenues and the number of payphone-originated calls."¹¹ As noted above, per-call tracking and compensation is perhaps the only true measure of how PSPs should be compensated for subscriber 800 and access code calls. Thus, the only way that the Commission can justify the use of total toll revenues as a substitute basis for payphone compensation is if it can show that no other means of compensation exists for that particular carrier -- that there are no other means by which the carrier could contribute for the calls it may carry. If a carrier can in fact perform per-call tracking and is prevented from doing so by the Commission, it can fairly be said that there is no nexus between the Commission's requirement that the carrier continue to engage in flat-rate compensation and the amount of compensation it is being compelled to pay.¹² The Commission should therefore act on the

¹¹ *Illinois Public Telecomm. Ass'n*, No. 96-1394, at p.17.

¹² Under the flat-rate compensation mechanism created by the *Order* and the *Reconsideration Order*, Telco would have overcompensated independent payphone providers by more than \$46,000 per month, and if LECs were included, the amount of overcompensation by Telco for payphone calls would rise by another \$200,000 per month. *Petition of Telco Communications Group, Inc. for Waiver of Section 64.1301 of the Commission's Rules*, CC Docket No. 96-128 (filed March 24, 1997). Even the RBOC Payphone Coalition, which together own the largest number of payphones, has expressed support for Telco's waiver petition as "consistent with the spirit and the language of the Commission's payphone orders." See Comments of RBOC Payphone Coalition, at 2 (filed June 6, 1997).

pending waiver petitions of Telco and other carriers to allow them to compensate PSPs on a per-call basis at the appropriate rate.

Finally, the Commission should impose full retroactive adjustments to the flat-rate interim payment obligations in accordance with the recommendations provided above. It would be grave error to allow PSPs to collect compensation under a regime that has been found by a United States Court of Appeals to be arbitrary and capricious. Allowing adjustments only from the date on which the court remanded the matter to this Commission would not remedy the fact that an arbitrary and capricious policy significantly affecting a number of carriers was previously imposed. The Commission can only avoid reasserting the arbitrary and capricious nature of the previous compensation mechanism by adjusting that mechanism in the manner discussed above and making these adjustments retroactive to the date when the compensation obligations were first imposed.

III. THE COMMISSION SHOULD NOT REQUIRE CARRIERS TO COMPENSATE FOR 0+ CALLS ON A FLAT-RATE BASIS.

The Commission is correct in its Public Notice when it concludes, "The concerns that the Commission expressed when it deferred per-call tracking and per-call compensation are not implicated in [the 0+ call] situation."¹³ The presubscribed carriers who receive 0+ calls from payphones already effectively track these calls in order to provide a commission to the location provider. Many carriers, however, carry little or no 0+ traffic. To include these other carriers in a flat-rate compensation mechanism for 0+ calls would be arbitrary and capricious, particularly since the Commission can establish a clear nexus for compensation between the presubscribed carriers's handling of traffic and each 0+ call. If the Commission is interested in ultimately moving toward a

¹³ Public Notice, CC Docket No. 96-128, DA 97-1673, at p.4 (rel. Aug. 5, 1997).

per-call compensation system for all payphone traffic, it should seize the opportunity to do so where effective per-call tracking capability already exists, as in the case of 0+ calls. In short, the Commission should require a presubscribed carrier who has carried a 0+ intraLATA or interLATA call from a payphone to compensate the PSP at the modified, cost-based default rate on a per-call basis.

IV. CONCLUSION

For the foregoing reasons, Excel and Telco respectfully request that the Commission act in accordance with the recommendations provided herein.

Respectfully submitted,



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Dated: August 26, 1997

CERTIFICATE OF SERVICE

I, Jolanda Tedford, hereby certify that a copy of the foregoing **Joint Comments of Telco Communications Group, Inc. and Excel Telecommunications, CC Docket No. 96-128** was sent to each of the following parties by hand delivery and regular mail (denoted with asterisk) on this 26th day of August, 1997.

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